cuted, and the contract sued on was one in which he recognized and contracted with the corporation, so that the doctrine of estoppel was mainly the basis for the result.

DAMAGES.—BREACH OF COVENANT OF WARRANTY OF TITLE.—The Empire Land Company, a corporation, contracted to buy some land from the defendant, the presumed owner, at one dollar an acre, the vendor agreeing to convey to any purchasers from the vendee; the Land Company then contracted to sell part of the same land to the plaintiff for four dollars an acre. Acting on the first agreement defendant deeded directly to the plaintiff with full warranties of title. Later it was discovered that defendant did not convey a good title and the plaintiff sued defendant on the covenant of warranty. *Held,* the breach of such a covenant is measured by the consideration paid by the grantee and not by the amount received by the grantor. *Hunt* v. *Hay,* (N. Y. 1915) 108 N. E. 851.

Several fundamental considerations would seem to justify the conclusion of the court. In the first place, it could be based on the equitiable maxim that of two innocent parties, he should suffer who has made the wrong possible. In the second place, the grantee paid the purchase price in consideration of the covenant given by the grantor, not for anything done or suffered by the third party. This is more apparent when we remember that such a covenant is a guaranty that the grantor will defend and protect the covenantee against all rightful claims presented. *Mitchell* v. *Warner,* 5 Conn. 497; *Bender* v. *Fromberger,* 4 Dall. (Pa.) 441. The logic and conclusion of the court in the principal case is supported by many cases. *McClure* v. *McClure,* 65 Ind. 482; *Bloom* v. *Wolfe,* 50 Ia. 286; *Barnett* v. *Hughey,* 54 Ark. 195; *Rash* v. *Jeune,* 26 Ore. 169; *Graham* v. *Leslie,* 4 Up. Can. C. P. R. 176; *Graves* v. *Mallingley,* 6 Bush. (Ky.) 361. There are several apparently conflicting authorities, notably, *Cook* v. *Curtis,* 68 Mich. 611, and *Staples* v. *Dean,* 114 Mass. 125. But a close examination removes this conflict, for in the last two cases the decision went off on the value of the land, admitting the point in controversy in the case above, that the covenantor had to pay.

DISCOVERY.—EXAMINATION OF DEFENDANT BEFORE TRIAL.—In an action for alienation of his wife's affections, plaintiff secured an order to examine defendant before trial who moved to vacate the same. *Held,* it not appearing that plaintiff honestly intended in good faith, to use his cause of action, he should not be given the right to examine before trial, for it would cast upon the defendant the burden of proving his defense before any case had been made against him. *Dryden* v. *Lattimer,* 151 N. Y. Supp. 121.

This case is the first one to arise in the state of New York involving the right in question when invoked in a suit for alienation of affections. It is fully in accord with previous decisions of the same court, however. An early case states the rule as follows: "Whenever it appears that the examination of the adverse party, before trial, is material and necessary, and that the application thereof is made in good faith, and not for the purpose of improperly extracting evidence from him, an order for examination will

be granted almost as a matter of course." *Hardy* v. *Peters,* 30 Hun 79. It is discretionary with the court to grant the order according to the circumstances of each case. *Wagner* v. *Haight and Truse Co.,* 89 N. Y. Supp. 323. And the fact that defendant states he will be present at the trial is not ground for refusing plaintiff's application. *Comm. Pub. Co.* v. *Beckwith,* 68 N. Y. Supp. 600. But where the information can be secured without the examination of the defendant it is improper to grant the same. *Tonenbaum* v. *Lippman,* 85 N. Y. Supp. 122. Other cases in accord with the principal one are *Plainwell* v. *Brown,* 4 Hen. & M. (Va.) 482; *Van Walters* v. *Board of Children's Guardians of M. County,* 132 Ind. 567. In Michigan as in other states there are statutes which affect the question. So in *Riopelle* v. *Doellner,* 26 Mich. 102, it was held that since the statutes have allowed parties to become general witnesses there is no further office for a bill of discovery. This decision was affirmed in *Shelden* v. *Walbridge,* 44 Mich. 251, but the proceedings under these statutes are limited by the rules applicable to a discovery in equity. *Mulhern* v. *Kent Circuit Judge,* 111 Mich. 528.

EASEMENTS.—ABANDONMENT.—Where a deed conveyed an easement in certain land for railroad purposes and after a short use the rails, ties, bridges, etc., were removed and for a period of ten years there was an actual nonuse of the easement, *held* this nonuser and above evidence showing intention of abandonment amounts in law to an actual and permanent abandonment which is not refuted by evidence showing that the railroad at all times considered their right as continuing, considering its non-use only temporary, and further evidence that the owners of the fee at all times sought to escape taxation as to the strip of land in question. *Norton* v. *Duluth Transfer & Ry. Co.,* (Minn. 1915) 151 N. W. 907.

Though logically unsound it is apparently recognized by many decisions that an easement may be extinguished by abandonment. *Tuttle* v. *Sawadzki,* 41 Ut. 501, 126 Pac. 959; *Day* v. *Walden,* 46 Mich. 575; *Jones* v. *Bochore,* 103 Mich. 98; *Moore* v. *Rawson,* 3 B. & C. 332, (which, however, involved an estoppel, as do many of the cases usually cited as sustaining the proposition.) The decision in the principal case appears to be in accord with previous decisions on the question involved, although on somewhat similar facts the courts have questioned whether there was an abandonment. It is agreed that abandonment by a railroad company of a part of its right of way will not be inferred from mere non-user. *N. Y. C. & H. R. R. Co.* v. *City of Chelsea,* 213 Mass. 40; *Home Real Estate Co.* v. *Los Angeles Pac. Co.,* 163 Cal. 760. To constitute an abandonment an intention to abandon the right of way must co-exist with the non-user. *Stannard* v. *Aurora E. & C. Ry. Co.,* 220 Ill. 469; and such intention may appear by acts as well as by declarations of the holder of the easement. *Jamaica Pond Aqueduct Co.* v. *Chandler,* 121 Mass. 3. A case closely in point on the facts with the principal case is that of *Jones* v. *Van Bochore,* 103 Mich. 98, holding that evidence of removal of rails, ties, fences and bridges is sufficient to show permanent abandonment of the easement of right of way. But see *Galveston & W. Ry. Co.* v. *City of Galveston,* (Tex. Civ. App.) 155 S. W. 273, where it was held that even